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Supreme Court, U. S.
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IN THE

MICHAEL RODAK, JR., CLE

Supreme Court of the United States

October Term, 1972

No. 71-1082

REUBIN O'D. ASKEW, et al.,

Appellants,

vs.

THE AMERICAN WATERWAYS OPERATORS,
INC., et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

~~REBELL~~ APPELLEES THE AMERICAN WATERWAYS OPERATORS, INC., AMERICAN INSTITUTE OF MERCHANT SHIPPING, AND ASSURANCEFORENINGEN GARD, ET AL., ~~REBELL~~ SUPPLEMENT TO THEIR PETITION FOR REHEARING, ~~REBELL~~

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Motion For Leave to Supplement Petition For Rehearing

Appellees The American Waterways Operators, Inc., et al., American Institute of Merchant Shipping, and Assuranceforeningen Gard, et al., respectfully move for leave to file the annexed Supplement to their Petition for Rehearing filed May 14, 1973.

The annexed Supplement points out that the questions decided in *City of Burbank v. Lockheed Terminal*, No. 71-1637, handed down the same day Appellees' Petition for Rehearing was filed, are essentially the same as those presented in this case but that the rationales and results of the two opinions appear irreconcilable. Accordingly, leave

is asked to file the annexed Supplement for the purpose of drawing these facts to the attention of this Honorable Court.

Respectfully submitted,

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Supplemental Petition for Rehearing

NOW COME Appellees The American Waterways Operators, Inc., *et al.*, American Institute of Merchant Shipping, and Assuranceforeningen Gard, *et al.*, and their respective members, who respectfully pray that this Honorable Court grant rehearing of this cause, for the reasons set forth in their Petition for Rehearing filed May 14, 1973, as hereby supplemented.

The slip opinion handed down May 14, 1973 in *City of Burbank v. Lockheed Air Terminal*, No. 71-1637, affirmed exclusive Federal control of aircraft, whereas the slip opinion in the present case appears to allow the States to exercise extensive legislative control over vessels using the navigable waters of the United States.

It is true that the Water Quality Improvement Act of 1970, as amended,¹ contains a "non-preemption" clause.² Appellees submit, however, that that clause was not intended to apply to the regulation of vessels, at least insofar as "evidence of financial responsibility" is concerned and that it must be considered in the context of the totality of Federal regulation of vessels.

As pointed out at page 10 of Appellees' Petition for Rehearing, §1161 (o) (2) of 33 U.S.C. [now §1321 (o) (2)] should be read in context with §1161 (e) [now §1321 (e)], which preserves to the States the right to legislate with respect only to "an actual or threatened discharge of oil into or upon the navigable waters of the United States

¹ P.L. 91-224, 84 Stat. 91, as amended by Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, 86 Stat. 816; 33 U.S.C.A. §§1251-1376. The 1972 Amendments have not as yet appeared in the Official U.S. Code.

² P.L. 92-500, 86 Stat. 816, §311 (o)(2); 33 U.S.C.A. §1321 (o) (2).

from an *onshore or offshore facility . . .*³ (emphasis added); Congress did *not* intend to give the States the right to regulate vessels. By imposing what it was satisfied were maximum liabilities, and by demanding maximum evidence of financial responsibility under the Federal Act, Congress in fact preempted that field with respect to vessels⁴ because it "left no room for the States to supplement . . ."⁵ those requirements.

Any doubt concerning Federal preemption with respect to "evidence of financial responsibility" was resolved by Congress when, by the 1972 Amendments, it added Subparagraph (H)⁶, which made it clear that the Federal Act addressed itself to State recoveries of clean-up costs from the Federal Government. The Attorney General of Florida conceded at the oral argument on November 14, 1972 that "If the federal act were to address itself to state recoveries, which it does not, then such a conflict might be found."⁷ The Attorney General was mistaken in his belief that the Federal Act does not address itself to State recoveries. In fact it does so address itself, and therefore, as he would appear to concede, a conflict in fact exists.

³ P.L. 92-500, 86 Stat. 816, §311 (e); 33 U.S.C.A. §1321 (e).

⁴ See Appellees' Petition for Rehearing filed May 14, 1973, pp. 8-9. It is significant that the Federal Act requires evidence of financial responsibility only with respect to vessels, and not onshore and offshore facilities. The Florida Act, on the other hand, requires such evidence from terminal facilities, as well as vessels. As suggested in the Solicitor General's Brief *Amicus*, the Federal Act would appear to have preempted the field of "evidence of financial responsibility" only insofar as vessels are concerned.

⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), quoted with approval at p. 9 of the *Burbank* slip opinion.

⁶ 86 Stat. 816, §311 (c) (2) (H); 33 U.S.C.A. §1321 (c) (2) (H). See Appellees' Petition for Rehearing, filed May 14, 1973, p. 5.

⁷ Transcript, pp. 14-15.

It became necessary for Congress to enact Section 1508 of the Federal Aviation Act of 1938⁸ because the authors of the Constitution did not contemplate that airspace would become a medium of interstate and foreign commerce. But the Constitution itself, by the Admiralty Clause, provided for Federal control of the navigable waters of the United States. With respect to control of maritime matters, "it was universally agreed at that time, that as this jurisdiction brought us into relations with the citizens and subjects of foreign countries, uniformity was indispensable. Amid all the questions on which our ancestors wrangled this is one of the few that was conceded to the common government without a groan."⁹ Giving the States the power to bar vessels from their ports unless they meet State-imposed "financial responsibility" requirements, in addition to those imposed by the Federal Government, results in the same type of "fractionalized control" with respect to maritime commerce that is decried in *Burbank* (slip opinion, page 15) with respect to air commerce.

The District Court in *Burbank* found the take-off curfew ordinance unconstitutional on both "preemption/conflict" and "undue burden" grounds, under the Commerce and Supremacy Clauses.¹⁰ This Court, because affirming

⁸ P.L. 85-726, 72 Stat. 731; 49 U.S.C. §1301 *et seq.* See p. 3 of the *Burbank* opinion.

⁹ Bausman, *Admiralty and Maritime Jurisdiction*, 36 AMER. L. REV. 182, 186 (1902). The author uses the term "jurisdiction" in the sense in which it was frequently used in earlier days, i.e., as referring to "a general authority to govern", and not merely to "the scope of judicial authority". See Robertson, *Admiralty and Federalism*, p. 136 (1970).

¹⁰ *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914, 921 *et seq.* (preemption), 926 *et seq.* (undue burden) (C.D. Calif. 1970); *Burbank* slip opinion, p. 2, note 1.

on Supremacy "preemption/conflict" grounds, did not reach the Commerce Clause "undue burden" challenge.¹¹ In *Askew*, however, the situation is reversed. The District Court found the Florida pollution regulatory scheme unconstitutional only on Admiralty Clause grounds, and expressly declined to reach alternate Commerce Clause "undue burden" and other constitutional challenges;¹² but the slip opinion in *Askew*, though reversing on the Admiralty Clause challenge, nowhere considered the "undue burden" or other constitutional objections presented on the record.

We submit that the *Askew* slip opinion should be modified as requested in the Petition for Rehearing, or at least remanded for consideration of Constitutional objections under the Commerce and Supremacy clauses, so that the apparent inconsistencies between *Burbank* and *Askew* might be resolved.

¹¹ *Burbank* slip opinion, p. 2, note 1.

¹² Opinion below, A40.

Respectfully submitted,

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